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FAMILY LAW FOCUS

Grades Are Tied to Custody Battle

Progress in school was related to behavioral problems of kids.

In a case spinning around the academics of junior high school, the Court of Appeals put to rest the stereotype of an overanxious mother pushing her offspring to settle down and finish their homework.

Mom and Dad wed in 1988; and six years later, the marriage was over. Their kids were 10 and 12.

Both parents were given joint legal and physical custody, with Mom being the primary caregiver.

SPOTLIGHT ON:

- Academic Progress of Children Linked to Custody Battle.....1
- Four Fathers Attempt to Avoid Obligations of Being a Dad.....2
- Reality Checks: Today's Kids.....2
- Parents Bar Son from Partner...3
- Helpful Legal Documents.....3
- Post-Nuptial Deal Controls.....4

In 2006, Dad filed a petition to modify custody, alleging Mom had failed to meet "the children's respective educational needs and behavioral disorders."

Dad Got Sole Custody of Kids

The trial court agreed. Granting Dad's petition, it gave him sole legal and physical custody.

Mom appealed, arguing the evidence was insufficient to prove the custody change was in the children's best interests and that there had been no "substantial change in circumstances," warranting the modification.

Unconvinced, the Court of Appeals affirmed the trial court.

Were Findings Erroneous?

On appeal, the lower court's findings "will be set aside only if they are clearly erroneous, that is, if the record contains no facts or inferences supporting them."

That was not the case here.

Evidence at trial showed both children experienced behavior problems, exhibited poor grades and failed the ISTEP. And when Dad sought testing to address the problems, Mom initially resisted his efforts.

After getting the results of various tests, Dad actively worked with the school to utilize its resources and services for each child.

While the Mom made some attempts to help with their academics, her efforts were minimally effective.

Dad Insisted on Educational Tests

Thus, in light of its standard of review, the Court noted, "we conclude that due to (the Dad's) insistence on educational testing a substantial change in the children's school environment occurred."

And "like the trial court, we find it in the children's best interest to modify custody to (the Dad) who is sensitive to their educational needs and who will actively aid them to reach their full academic potential."

See *Webb v. Webb,* 868 N.E.2d 589 (Ind.App. 2007).♦

Father helped both children with their homework after school.

Four Fathers Try to Escape Obligations of Being a Dad

Each father wanted to avoid paying any child support for his child.

Four Fathers were parties on appeal when, in this consolidation of their cases, they argued they were not the fathers of their kids.

In each case, the supposed Father had signed a paternity affidavit upon the birth of his child.

In each case, the State brought an action to establish a child support order, based on the Father's execution of his paternity affidavit.

Dads Signed Paternity Affidavits

Each hearing was held more than 60 days after the Father had executed his paternity affidavit.

Nonetheless, each Father asked for genetic testing to disprove his paternity, and the trial court granted each of the requests.

Arguing abuse of discretion in the lower court's interpretation of statutory law, the State appealed, and the Court of Appeals agreed.

Indiana Code §31-14-7-3 provides "[a] man is a child's legal father if the man executed a paternity affidavit. . . (and it) has not been rescinded or set aside."

Order for Genetic Testing

Such may be set aside if a putative father, within 60 days of executing the affidavit, files an action to request an order for a genetic test, the Court explained.

"All four of the [F]athers admittedly signed a paternity affidavit pursuant to this statute and did not rescind or set aside the affidavit within the 60-day time frame," the Court said. "Therefore, . . . paternity was already established."

Was Fraud or Duress Alleged?

Furthermore, none of them alleged that "fraud, duress or material mistake of fact" existed in the execution of the affidavit — the only statutory grounds for rescinding an affidavit.

Instead, the court rescinded because, the Fathers argued, they were "not aware of the legal ramifications" of the document.

"This is not a valid statutory reason for setting aside the paternity affidavits."

Reversed and remanded.

For further information, see *In Re Paternity of E.M.L.G.*, 863 N.E.2d 867 (Ind.App. 2007).♦

REALITY CHECKS:

In this compilation of annual reports about American children, some sobering statistics emerge.

√ In 2006, there were 73.7 million children ages 0-17 in the United States, or 25% of the population, down from a peak of 36% at the end of the "baby boom" era in 1964.

√ 58% of them were White, non-Hispanic; 20% were Hispanic; 15% were Black; 4% were Asian; and 4% were all other races.

√ The percentage of children who are Hispanic has increased faster than that of any other racial or ethnic group, growing from 9% of the child population in 1980 to 20% in 2006.

√ In 2006, 67% of children ages 0-17 lived with two married parents, down from 77% in 1980.

√ 18% of all children ages 0-17 lived in poverty during 2005; among children living in families, the poverty rate was 17%.

√ In 2005, 89% of children had health care insurance at some point during the year, down from 90% in 2004.

√ Children are projected to be 24% of the population by 2020.

SOURCE: http://childstats.gov; *America's Children: Key National Indicators of Well-Being, 2007.*♦

Parents Keep Gay Partners Apart

Parents prevented life partner from contacting their disabled son.

If ever there were a textbook case on the wisdom of doing some estate planning, this appeal is it.

At its heart is a tug-of-war over Patrick, an adult gay man who met his life partner, Brett, in 1978.

Disabled by a stroke, Patrick now lives with his parents — and Brett is barred by them from having any contact with him.

Patrick's family "vehemently disapproves of his relationship with Brett," despite their son's "begging them" to welcome Brett.

They also have not accepted Patrick's or Brett's sexual orientation, believing "homosexuality is a grievous sin."

Partner Suffered Aneurysm

In March of 2005, Patrick suffered a ruptured aneurysm and landed in an Atlanta, Georgia, hospital during a business trip.

Brett — and Patrick's parents — traveled to the hospital.

There the mom told Brett "if Patrick was going to return to his life with Brett after recovering from the stroke, she would prefer that he not recover at all."

In the months that followed, the family restricted Brett's visits to the hospital and the nursing facilities where Patrick was a patient.

Parents Barred Life Partner

Then the parents moved Patrick into their home in November of 2005, refusing to let Brett have any contact with him.

In January of 2006, Brett filed a petition asking, among other things, for an order that would give him contact with Patrick. It was denied.

On appeal, he argued the trial court erred, citing the abundance of evidence in the record that indicated his visiting would be therapeutic.

Orders for Incapacitated Person

In its analysis, the Court of Appeals noted a trial court is required to enter certain orders in the case of an incapacitated person.

Such orders are to "encourage development of the incapacitated person's self-improvement, self-reliance, and independence" and to "contribute to the incapacitated person's living as normal a life as that person's condition and circumstances permit without psychological or physical harm . . . " Indiana Code §29-3-5-3(b).

The court also must order appropriate relief if it finds a party is not acting in the incapacitated person's best interest. Indiana Code §16-36-1-8(d).

Evidence Was Overwhelming

Because the evidence at trial "overwhelmingly establishes that it is in Patrick's best interest to spend time with Brett and (the parents) have made it crystal clear that, absent a court order requiring them to do so, they will not permit Brett to see their son, it was incumbent upon the trial court to order visitation as requested by Brett."

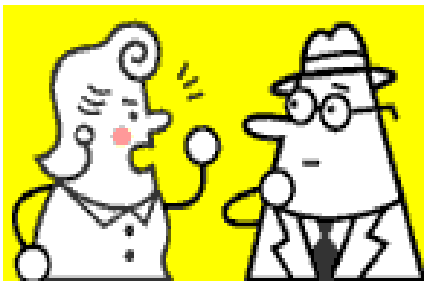
Therefore, "we reverse the judgment of the trial court on this basis and direct it to amend its order to grant Brett visitation and contact with Patrick . . . ."

In Re Guardianship of Atkins, 868 N.E.2d 878 (Ind.App. 2007).♦

LEGAL CHECKLIST

- **Will**: Provides for a final distribution of one's property and assets after his or her death.
- **Power of Attorney**: Gives someone the power to act on behalf of another; generally, it is used for finanical matters.
- **Appointment of Health Care Representative**: Names a person to make medical decisions on behalf of another.
- **Living Will**: Expresses how one wants to be treated if suffering from a terminal illness in which death is imminent.♦

Couple Argues over Post-nup Deal



Husband petitioned to be released from life insurance provision.

Even though the parties in this case had an unhappy marriage, they put a business-like face on it and drafted a post-nuptial agreement.

The Husband and Wife were married in 1970 and lived in Illinois until 2001 when they moved to Florida. During their marriage, they had a vacation home in Indiana.

In December of 2004, the couple separated and entered into a post-nuptial agreement.

Husband Promised to Pay

Among other things, it provided the Husband would keep a $125,000 life insurance policy in force, with the Wife as beneficiary.

Such obligation would "only terminate upon the death of the Husband or death of the Wife, whichever occurs first."

The Husband moved into their Indiana home in 2005, and in January of 2006, he filed for divorce.

In response, the Wife petitioned for provisional orders consistent with their post-nuptial agreement.

Petition to Modify Was Filed

In August of 2006, the trial court held a final hearing where the Husband sought a modification "to release him from the alimony and life insurance provisions."

A month later, the trial court entered a final decree of dissolution, wherein it adopted and incorporated all of the post-nuptial agreement — but for the insurance provision.

On appeal, the Wife argued the court erred in releasing Husband from the requirement that she be named as beneficiary of the policy.

The Court of Appeals agreed.

"The acceptance or rejection of a post-nuptial agreement is within the trial court's discretion," it noted.

Was There Fraud or Duress?

"In reviewing (such an) agreement, a court should concern itself only with fraud, duress, and other imperfections of consent, … or with manifest inequities, particularly those deriving from great disparities in bargaining power."

In this case, the Husband offered no evidence that he entered into the agreement under fraud, duress or misrepresentation.

Nor did he argue that the agreement was manifestly inequitable.

Because the court made no findings as to "fraud, duress, other imperfections of consent, or manifest inequities," the case was reversed.

See *Augle v. Augle,* 868 N.E.2d 1146 (Ind.App. 2007).♦

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